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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1605

JIM BUCKLEY and AL GOLDSTEIN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Opinions Below	2
Jurisdiction	2
Statement of the Case	3
Argument	
Point—The New York Court of Appeals, as the final arbiter of New York law, has conclusively determined that New York had judicially limited its obscenity statute to comply with the requirements of *Miller*	6
Conclusion	10
Appendix—Exhibit A	11

TABLE OF AUTHORITIES

Cases:

Cryan v. Namar Theatres, Inc., No. 73-711	10
Hamling v. United States, No. 73-507	9
Heller v. New York, 413 U.S. 483 (1973)	2, 4, 6
Jenkins v. Georgia, No. 73-557	9
Kois v. Wisconsin, 408 U.S. 229 (1971)	7
Miller v. California, 413 U.S. 15 (1973)	4, 5, 6, 7, 8, 9, 10

PAGE

People v. Buckley, 72 Misc. 2d 549, 340 N.Y.S. 2d 191 (App. Term, 1st Dept. 1972) 2, 4, 5
People v. Buckley, 65 Misc. 2d 917, 320 N.Y.S. 2d 91 (Crim. Ct. N.Y. County 1971) 2, 3
People v. Heller, 33 N.Y. 2d 314, 307 N.E. 2d 805, 352 N.Y.S. 2d 601 (1973) 2, 5, 6, 7

Roth v. United States, 354 U.S. 476 (1957) 7

Statutes and Constitutional Provisions:

Constitution of the United States:
Amendment I 7, 9
Amendment XIV 7

New York Penal Law:
§135.00 12
§235.00 [present] 7, 8
§235.00 [as affected by amendment] 7, 11, 12
§235.05 2

18 U.S.C. §1461 9

28 U.S.C. §1257(3) 3

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Preliminary Statement

Jim Buckley and Al Goldstein seek certiorari to review a judgment of the Court of Appeals of the State of New York, rendered December 28, 1973, which affirmed, by a divided Court, a judgment of the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, rendered December 7, 1972, which unanimous-

ly affirmed a judgment of the Criminal Court of the City of New York, New York County, rendered March 30, 1971, convicting them, after trial, of OBSCENITY IN THE SECOND DEGREE (New York Penal Law §235.05). The petitioners were each sentenced to pay fines totaling $1,500. The fines were paid on April 13, 1971.

The Opinions Below

In the Court of Appeals of the State of New York, the case was consolidated with the remand from this Court of *Heller* v. *New York*, 413 U.S. 483 (1973). Accordingly, the case is reported as *People* v. *Heller*, 33 N.Y. 2d 314, 307 N.E. 2d 805, 352 N.Y.S. 2d 601 (1973). The Appellate Term of the Supreme Court of the State of New York, New York County, affirmed the case without opinion, in a decision reported at 72 Misc. 2d 549, 340 N.Y.S. 2d 191 (1972). The opinion of the Criminal Court of the City of New York, New York County, appears at 65 Misc. 2d 917, 320 N.Y.S. 2d 91 (1971). These opinions are reprinted in petitioner's appendices A, B, and D.

Jurisdiction

The petition for certiorari was filed on or about April 27, 1973, pursuant to an order of Mr. Justice MARSHALL which extended the time for filing until this date. The petitioner invokes this Court's jurisdiction on certiorari pursuant to 28 U.S.C. §1257(3).

Statement of the Case

During May, June and August of 1969, a New York City police officer purchased six issues of a publication called "*Screw*" from various newstands in the County of New York. Subtitled "The Sex Review," *Screw* is a weekly periodical devoted exclusively to sexual material, which has roughly the same size, shape and appearance as a tabloid newspaper. The issues purchased, at a price of from 35 to 50 cents each, were Nos. 14, 15, 17, 22, 23 and 24.

The officer took each issue of this publication to a judge of the Criminal Court of the City of New York. Each judge, after examining the tabloid, determined it to be obscene and issued arrest warrants.

Pursuant to stipulations, the obscenity of each of the issues in question was litigated at a single trial. Charged with obscenity in this proceeding were Jim Buckley, publisher of *Screw*, Al Goldstein, the periodical's editor, and Martin Balan, the president of the corporation that printed the tabloid.

After a lengthy and extensive proceeding during which both sides produced numerous expert witnesses and all defendants testified on their own behalf, the three-judge Criminal Court trial panel, in a lengthy *per curiam* opinion, held that the publication was obscene and sentenced defendants Buckley and Goldstein to pay fines totaling $1,500 each. Defendant Balan, *Screw*'s printer, was acquitted, the court finding that the People failed to prove *scienter* beyond a reasonable doubt. *People* v. *Buckley*, 65 Misc.2d 917, 320 N.Y.S. 2d 91 (1971).

The judgment of the Criminal Court was affirmed without opinion by the Appellate Term, First Department. *People* v. *Buckley*, 72 Misc.2d 549, 350 N.Y.S. 2d 191 (1972). On February 22, 1972, leave to appeal to the New York Court of Appeals was granted by a judge of that court.

Before the case could be argued in the New York Court of Appeals, this Court decided *Miller* v. *California*, 413 U.S. 15 (1973), and related obscenity cases, including *Heller* v. *New York*, 413 U.S. 483 (1973). In *Miller* and its companions, this Court announced that state statutes designed to regulate obscene materials must be limited "to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. at 24.

At the time of the *Miller* decision, this Court also had before it the case of *Heller* v. *New York*, which involved the question of whether a pre-trial adversary hearing was necessary to determine if a work was obscene for purposes of its seizure. This Court decided that such a hearing was not constitutionally required, as long as the material under consideration had been scrutinized by a judge or magistrate who then found it to be obscene and ordered its seizure. This Court then remanded that case to the New York Court of Appeals "for the sole purpose" of afford-

ing the New York Courts an opportunity to reconsider the New York obscenity statute in the light of the newly announced *Miller* guidelines. 413 U.S. at 494.

The instant case was consolidated with the remand of *Heller* in the New York Court of Appeals. The majority of that court construed the statute, in the light of its own decisions and those of other New York courts, and found that the statute had been judicially limited to render illegal only "hard core pornography". The court further decided that the statute as limited complied with the *Miller* guidelines and was constitutional. On the question of the obscenity of *Screw* magazine, the court specifically found that:

> "The magazine *Screw* is also clearly obscene by any standard. The issues in evidence are crammed with photographs of naked men and women engaging in homosexual and heterosexual acts, in many instances with genitals prominently and lewdly displayed. Drawings and cartoons, are also explicit, exaggerating sexual activity to preposterous degrees. Book and movie reviews are confined only to the works which deal with sex, the worth of a movie being measured by the degree of male erection it is likely to induce. The advertising is no less egregious. The issues contain display ads for what used to be called stag films; sex paraphernalia such as dildoes are prominently illustrated in detail; and personal ads soliciting male and female participation in sex acts of every conceivable sort are written quite unambiguously. Many of the articles are totally sex oriented and are written in the most graphic terms. The use of all the most abominable dirty words is prevalent both in headlines and in text. Indeed, it is hard to conceive of how a publication could reach any

further lows in attempts to appeal to prurient interest." (33 N.Y.2d 314, 333, 307 N.E. 2d 805, 816; 352 N.Y.S. 2d 601, 617 [A14])*

Three judges dissented, opining that the statute, even as judicially construed, was not sufficiently limited to comport with the guidelines of *Miller*.

In the petition for certiorari, Buckley and Goldstein argue that the New York Court of Appeals' decision was erroneous, and the statute cannot be held to have been sufficiently limited to comply with the *Miller* guidelines. They also complain that *Screw* is not obscene.

ARGUMENT

POINT

The New York Court of Appeals, as the final arbiter of New York law, has conclusively determined that New York had judicially limited its obscenity statute to comply with the requirements of *Miller* [answering the petition].

In *Heller* v. *New York*, 413 U.S. 483 (1973), this Court upheld as constitutional the New York practice of submitting obscene materials to a judge for an *ex parte* determination as to their obscenity before seizure. However, this Court then ordered the case remanded "for the sole purpose of offering the New York courts an opportunity to reconsider" the applicable New York obscenity statute in the light of the approved guidelines for the state regula-

* Numbered references preceded by the letter "A" are to petitioner's appendix.

tion of obscene material announced in *Miller* v. *California*, 413 U.S. 15, 24 (1973) and companion cases. As stated in *Miller*:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin, supra*, at 230, quoting *Roth* v. *United States, supra* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Miller*, this Court specifically announced that if the applicable state law "as written or authoritatively construed" comported with these guidelines, "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected * * *." 413 U.S. at 25.

In the instant case, which was combined for argument in the New York Court of Appeals with the *Heller* case on remand from this Court, the court exhaustively examined its own precedents and conclusively determined that the definition of obscene material contained in the New York Penal Law §235.00 had been judicially limited by decisions of the New York courts to apply only to "hard core pornography." The court further decided that as limited, the statute thus complied with the *Miller* guidelines. *People* v. *Heller*, 33 N.Y.2d at 315-334, 307 N.E. 2d at 807-817, 352 N.Y.S. 2d at 607-618 (A1-19). The petitioner now claims that this decision was incorrect, and that the statute cannot be read to comply with *Miller*. He also claims that the material for which he was prosecuted, *Screw Magazine*, is not obscene. Petitioner is wrong.

At the very outset, it might be noted that the major question raised in the instant petition, the constitutionality of Penal Law §235.00, may soon be moot. A recent bill to amend the New York Penal Law and change the definition of obscenity has passed both houses of the New York Legislature and is now awaiting signature by the state's governor, an event which is expected to occur no later than June 15. This bill (No. 31033-A of 1974), substantially restates the *Miller* guidelines and would enact them into law as the definition of obscenity in New York. The bill is reproduced as Exhibit A to this brief.*

In any event, even were the New York law not to change, the New York Court of Appeals is the ultimate arbiter of New York law and, acting as such, has authoritatively construed its own prior decisions and those of other New York courts to have limited the reach of the New York obscenity statute to "hard core pornography," a meaning which it held to be identical to this Court's definition of "works which depict or describe sexual conduct." This determination is of course the "last word" on the question of the meaning of prior New York law, and petitioner fails to show any permissible method by which this Court can re-review the past decisions of the New York courts to reach a different result. And, while the conclusion of the Court of Appeals that the statute as limited complies with the *Miller* guidelines is potentially reviewable in this Court as a matter of constitutional interpretation, respondent relies upon the opinion of the New York Court of Appeals in this regard.

* If the bill is vetoed by Governor Wilson, the respondent will, by letter, promptly notify this Court.

However, appellant notes that this Court has recently granted certiorari or heard argument in other obscenity cases, concluding that "this case deserves the same consideration" (petition, p. 14). These cases, however, involved different issues. In *Jenkins* v. *Georgia*, No. 73-557, argued 4/15/74, the principal issue appeared to be whether the First Amendment question of "serious literary and artistic value" could be safely left to the consideration of a local community jury in Georgia, which found such values lacking in the film "Carnal Knowledge." However, in the course of its decision of the instant case, the New York Court of Appeals announced that a "state-wide standard of obscenity would be applied in New York," and thus this question is not presented by the instant case. Moreover, it might also be noted that the Court of Appeals specifically determined that *Screw Magazine* would be "obscene by *any* standard," and petitioner thus cannot be heard to seriously complain that the material under consideration, which is a tabloid newspaper exclusively concerned with sexual material, possesses the sort of non-sexual literary or scientific merit present in a film like "Carnal Knowledge."

Further, in *Hamling* v. *United States*, No. 73-507, argued 4/15/74, this Court had before it the question of whether the federal obscenity statute, 18 U.S.C. §1461, on its face and as construed, applied to the defendant's pre-*Miller* conduct. Of course, this Court may review the prior decisions of the federal courts and itself determine whether those decisions had sufficiently limited the federal statute to render that statute constitutional in the light of *Miller*. The instant case, however, involves a question of state precedent, which may only be authoritatively construed by the state's highest court, as was done herein.

Lastly, in *Cryan* v. *Namar Theatres, Inc.*, No. 73-711, this Court noted probable jurisdiction to review a challenge in the federal courts to the New Jersey obscenity statute, which has not been specifically construed by the highest court of that state in the light of *Miller*. Thus, this case also presents a different question than that presented herein.

Conclusion

The petition should be denied.

Respectfully submitted,

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APPENDIX

Exhibit A

When bill #31033-A is signed by the Governor of the State of New York, the definition of obscenity contained in the New York Penal Law [§235.00] will be as follows:

"§235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10, and 235.15:

1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. 'Material' means anything tangible which is capable of being used or adopted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner.

3. 'Performance' means any play, motion picture, dance, or other exhibition performed before an audience.

4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

5. 'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. 'Simulated' means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. 'Sodomy' means any of the types of sexual conduct defined in subdivision two of section 130.00* provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered."

* That section provides that:

"'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva."

CERTIORARI DENIED